85-1282

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC
and HERBERT R. KASNETZ, M.D.,

Petitioners

VS.

GROUP HOSPITAL SERVICE, INC.,
GROUP LIFE & HEALTH INSURANCE COMPANY
and GROUP MEDICAL AND SURGICAL SERVICE
COMPANY, d/b/a BLUE CROSS AND BLUE
SHIELD OF TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TOM THOMAS
KOLODEY & THOMAS
Eleventh Floor
Two Turtle Creek Village
Dallas, Texas 75219
(214) 528-5511

Attorneys for Petitioners

QUESTIONS PRESENTED

The issues in this appeal are as follows:

1. Whether the District Court erred in ruling that the Respondents did not have the capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether the District Court erred in ruling that Petitioners did not introduce sufficient evidence of the requisite anticompetitive effect of Respondents' conduct to warrant submission of the case to the jury.

3. Whether the District Court erred in ruling that the Petitioners did not present sufficient evidence of their claim of per se violation to warrant submission of the issue to the jury.

4. Whether the District Court erred in holding that the evidence, when viewed most favorably to Petitioners, did not warrant submission to the jury of the boycott issues.

LISTING OF PARTIES

itioners are:

Irving Ear, Nose, Throat & Allergy Clinic and
Herbert R. Kasnetz, M.D.

spondents are:

Group Hospital Service, Inc.
Group Life and Health Insurance Company
Group Medical and Surgical Service Company
All of the Respondents do business under the name
Blue Cross and Blue Shield of Texas

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
LISTING OF PARTIES	(ii)
TABLE OF CONTENTS	(iii)
TABLE OF AUTHORITIES	(iv)
OPINION BELOW	2
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	6
CONCLUSION	14
APPENDIX A Opinion of the United States Court of Appeals for the Fifth Circuit dated October 31, 1985	A-1
APPENDIX B Sherman Act, 15 U.S.C. § 1	B-1
APPENDIX C Trial transcript, pp. 767-768	C-1

TABLE OF AUTHORITIES

	Page
Cases	
Arizona v. Maricopa County Medical Society, 457 U.S. 332, 351, 102 S. Ct. 2466, 2476, 73 L. Ed. 2d 48 (1982)	10, 11
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)	8
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)	6
Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)	10
Plueckhahn v. Farmer's Ins. Exchange, 749 F. 2d 241, 245 n. 7 (5th Cir. 1985)	6
Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31, 65 S. Ct. 502, 517, 55 L. Ed. 619 (1911)	9
United States v. Parke, Davis and Co., 362 U.S. 29, 46-47, 80 S. Ct. 503, 513 (1960)	10
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940)	9
Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F. 2d 476 (4th Cir. 1980)	11, 12, 13
Statutes	
Tex. Ins. Code art. 13.02	7
Tex. Ins. Code art. 14.02	7
Tex. Ins. Code art. 14.05	8
Tex. Ins. Code art. 14.11	7
15. U.S.C. § 1	9

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC
and HERBERT R. KASNETZ, M.D.,

Petitioners

VS.

GROUP HOSPITAL SERVICE, INC.,
GROUP LIFE & HEALTH INSURANCE COMPANY
and GROUP MEDICAL AND SURGICAL SERVICE
COMPANY, d/b/a BLUE CROSS AND BLUE
SHIELD OF TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully request the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case dated October 31, 1985.

OPINION BELOW

The unpublished opinion of the Court of Appeals, dated October 31, 1985, is reproduced as Appendix A.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on October 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Section 1 of the Sherman Act, 15 U.S.C. § 1, reproduced in Appendix B.

STATEMENT OF THE CASE

Petitioners, Plaintiffs-Appellants below, are Dr. Herbert R. Kasnetz, an ear, nose, throat and allergy specialist, and his professional association, Irving Ear, Nose, Throat & Allergy Clinic. Petitioners brought this action in the District Court against Respondents, three Blue Cross/Blue Shield companies: Group Hospital Service, Inc. ("GHS"), Group Life and Health Insurance Company ("GLH"), and Group Medical and Surgical Service ("GMSS"). Petitioners alleged that Respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by their (1) horizontal and vertical price fixing, (2) horizontal group boycott, and (3) restraint of trade. At the close of Petitioners' case after five days of jury trial, the District Court directed a verdict in favor of Respondents. The Court of Appeals affirmed.

Kasnetz began his medical practice in 1967 and built his clinic in 1975. He saw approximately 700 patients per week and worked on the staff of a local hospital. Most of his patients relied upon some form of insurance for payment,

and approximately one-third of them were insured by Respondents, together the state's then largest insurer.

In 1976, Respondents adopted a "cost containment" program designed to control physicians' fees through the use of economic sanctions against doctors they considered to be charging excessive fees (Tr. 31-32, 38-39, 72-75). The purpose of the program was to curtail ongoing corporate operating losses through physician "fee regulation" (PX 7; Tr. 31) in order to reduce premiums and maintain Respondents' market share (Tr. 39, 67-68).

Respondents' program first divided Texas into several regions and arrayed its statewide compilation of historic claim charges by medical specialty in order to determine the 90th percentile charge for each service item (Tr. 77-78). Staff physicians then used their subjective judgment to determine which services were reimbursable as necessary for the treatment of a particular problem and which charges were unnecessary and would not be paid (Tr. 288-294). All physicians filing claims with Respondents were assigned a number, and as claims were received, they were compared to the profiles to determine if they exceeded internal limits and if services were being rendered which the guidelines regarded as unnecessary. Once Respondents identified those physicians whose charges or services exceeded the profiles, they attempted to "rehabilitate" them (Tr. 73, 77-78) by first having a representative contact them directly and suggest that they reduce their charges (Tr. 132-133). If the physicians did not comply, Respondents applied pressure by contacting local medical societies requesting peer group review (Tr. 98-99, 133-134, 222-230). If the doctors still resisted, Respondents then placed them on "prepayment review" which consisted of a course of economic sanctions designed to force the doctors to charge the same prices as others within their specialty. Kasnetz was one of these doctors.

The first and most devastating step in the program was that of dishonoring assignments and making claim payments to the patients rather than the doctors (Tr. 99, 132, 134, 139, 140, 146, 147, 202, 204, 252, 253, 435). Respondents knew that this would result in many patients keeping the checks, thus destroying essential harmonious relationships between the doctors and their patients and creating financial pressure on the doctors from reduced cash flow (PX 4; Tr. 48, 70-72, 137, 362).

Respondents simultaneously began making partial, rather than full, payments to the patients (Tr. 214-215, 272, 436-437), eliminating payments for certain services which they deemed to be "medically unnecessary" (Tr. 290-291), delaying payments (Tr. 293, 438), "losing" claims (Tr. 438), and suggesting that his patients find other doctors (Tr. 490, 695-696). Some of Kasnetz' patients and their group insurance representatives were told that Kasnetz was rendering medically unnecessary services (Tr. 207-208, 210, 291) and that the patients' claims would be paid if they used other doctors (Tr. 213). Through an alleged investigation of fraudulent billing practices, Respondents inferred that Kasnetz was dishonest (Tr. 314). The Respondents' medical director also filed complaints with the local medical society and the Texas State Board of Medical Examiners in an attempt to get Kasnetz to reduce his fees and the frequency of his allergy injections (Tr. 226-228).

Respondents' conduct had a devastating effect upon Kasnetz' practice. At trial, several patients testified that they had stopped going to Kasnetz because of the problems caused by Respondents (Tr. 435-439, 614, 640, 658, 677-678, 696) and that they had either warned away other potential patients or withheld recommendations of Kasnetz because of these problems, all despite the fact that they universally

appreciated Kasnetz' ability as a doctor and found his treatments to be satisfactory (Tr. 615-616, 640, 678-679). As a direct result, Petitioners suffered severe losses of patients and hundreds of thousands of dollars in income between the years 1976 and 1983 (Tr. 408-421, 773, 778, 780, 794), with a commensurate corresponding drop in the amount of medical supplies ordered from out-of-state suppliers (Tr. 393). The number of patients treated declined from 700 per week to less than 100, and the surgeries performed dropped dramatically (PX 61, 62; Tr. 408, 420-421, 439). Petitioners refused to capitulate to Respondents, but attempts to offset the losses were futile (Tr. 439-440). Petitioners then brought this action.

The District Court directed a verdict for Respondents at the close of Petitioners' presentation of their case. The District Court concluded that the Respondent companies did not have the legal capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act. The District Court also concluded that the evidence, when viewed most favorably to Kasnetz, did not warrant submission of the price fixing and boycott issues to the jury. The District Court found that Kasnetz did not introduce requisite evidence of the anticompetitive effect of Blue Cross/Blue Shield's conduct in order to submit the case to the jury.

The Court of Appeals affirmed the trial court's decision. The Court of Appeals agreed with the District Court that GHS and GLH were incapable of conspiring with each other. The Court of Appeals found it "unnecessary" to decide whether GMSS was capable of conspiring with the other two defendants. Thus, the Court of Appeals did not decide the conspiracy issue because it considered the alternate ground for District Court's ruling to be "solidly

grounded in existing law." On that alternate ground, the Court of Appeals ruled that Kasnetz had failed to present evidence sufficient for submission to the jury of his restraint of trade claim under a rule of reason analysis or of his claim of a per se violation.

REASONS FOR ALLOWING THE WRIT

This petition should be granted so that the Court may resolve the following issues:

1. *Whether the District Court erred in ruling that the Respondents did not have the capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.*

The District Court held on the basis of this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*[1] that the three Respondents were legally incapable of combining or conspiring with one another and that, therefore, they did not violate Section 1 of the Sherman Act. The Court of Appeals acknowledged that, after *Copperweld*, GHS and GLS, its wholly owned subsidiary, were incapable of combining or conspiring. The Court of Appeals, however, specifically elected not to decide, on the basis of *Copperweld*, whether GMSS was incapable of conspiring with the other two Respondents.

This Court in *Copperweld* held that a corporation and its wholly owned subsidiary were incapable of combining or conspiring, but this Court expressly reserved comment on the issue of conspiracy among non-owned corporations.[2]

---

[1] 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

[2] "We do not consider under what circumstances, if any, a parent [corporation] may be liable for conspiring with an affiliated corporation it does not completely own." *Id.* at 2740. In recognition of this reservation, but yet in stark opposition to its decision in the case at bar, the Fifth Circuit has ruled that a case which "does not involve a parent and its wholly-owned subsidiary" "presents a different question from *Copperweld.*" *Plueckhahn v. Farmer's Ins. Exchange*, 749 F. 2d 241, 245 n. 7 (5th Cir. 1985).

GMSS is not a wholly owned subsidiary of either of the other two Respondents.

The separate Respondent companies control a large share of the health and accident insurance in Texas and in fact were dominant in the market. Not only are the individual companies separately chartered corporations which have a pervasive influence in a select market, they maintain their separateness in claims payment procedures, and they account separately among themselves as shown by the separate 1099 forms which Petitioners received from them each year. Insurance companies in Texas conduct business within the guidelines prescribed by the particular chapter of the Insurance Code of their incorporation. No insurance company, unlike a typical business corporation, can be chartered to conduct all lines of business. As such, they are necessarily separate, and are thereby forced by law to operate within separate segments of the industry. They cannot operate as alter egos, even if owned as a subsidiary or are part of a controlled group.

GHS, a nonprofit corporation, owns GLH, a company organized for profit. The third company, GMSS, is a nonprofit mutual assessment company operating for, and at the direction of, its members. There is no unity of power or ownership among the three. GMSS is chartered as a statewide mutual assessment company pursuant to chapters 13 and 14 of the Texas Insurance Code. As such, it is owned by its members, the policyholders.[3] Article 13.02 of the Texas Insurance Code provides that "every mutual assessment life,

---

[3]Tex. Ins. Code arts. 14.02 and 14.11 (1981). Article 14.11 states that "membership in the association shall be confined to persons qualified under the provisions of the bylaws. Such membership shall equal the qualifying membership at all times...." Article 14.02 states in pertinent part that " 'member' shall include policyholders or any persons insured by an association, by whatsoever means the insurance may be made effective."

health and accident insurance company...may amend or extend its charter by compliance with the general corporation laws of Texas." Article 14.05 further provides that the "bylaws of any association may be amended by a majority of the members." Therefore, should the members of GMSS so choose, they can offer any line of life or health insurance, including lines which may directly compete with those offered by GHS and GLH, and those corporations would be powerless to stop it. Any alleged absence of competition between these companies in the past or present is not controlling on the issue of ability to conspire. What is controlling is GMSS' potential ability to compete with GHS and GLH.

2. *Whether the District Court erred in ruling that Petitioners did not introduce sufficient evidence of the requisite anticompetitive effect of Respondents' conduct to warrant submission of the case to the jury.*

Petitioners clearly introduced sufficient evidence of the anticompetitive effect of Respondents' actions. In order to succeed in a private anti-trust action under the rule of reason, a plaintiff must show injury to competition, not just to himself. He must show that the alleged unreasonable restraint tends to or is calculated to prejudice the public interest and that his "injury is of the type that the anti-trust laws were intended to prevent and flows from that which makes defendants' acts unlawful. The injury must reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation."[4]

The Court of Appeals ruled that Petitioners had "utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade." The Court

[4] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

of Appeals based its ruling, however, on its belief that Petitioners did not demonstrate injury to competition in the market area or show how Respondents' program affected competition among other physicians within Kasnetz' specialty or among physicians in his geographic area. Petitioners did, in fact, demonstrate injury to competition in the geographic market area and among physicians of Kasnetz' speciality. Petitioners' economic expert, Dr. Wade Clifton, testified at trial in support of these contentions.[5]

3. *Whether the District Court erred in ruling that the Petitioners did not present sufficient evidence in their claim of per se violation to warrant submission of the issue to the jury.*

Both the District Court and the Court of Appeals held that the Petitioners presented insufficient evidence on their claim of per se violation to warrant submission of the issue to the jury. Section 1 of the Sherman Act of 1890 prohibits *every* agreement in restraint of trade.[6] This Court in *Standard Oil Co. of New Jersey v. United States*[7] recognized that inquiry under its rule of reason ended once a price fixing agreement was proved, for there was "a conclusive presumption which brought [such agreements] within the statute." Later, in *United States v. Socony-Vacuum Oil Co.,*[8] this Court acknowledged that "any combination which tampers with price structures is engaging in unlawful activity." "Whatever economic justification particular price fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of the actual or potential threat to the central nervous system of the economy."[9] Then, in *Kiefer-Stewart Co. v.*

---

[5]Trial transcript, pp. 767-768, reproduced in Appendix C.
[6]15 U.S.C. § 1; *see* Appendix B.
[7]221 U.S. 1, 31, 65 S. Ct. 502, 517, 55 L. Ed. 619 (1911).
[8]310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940).
[9]*Id.* 310 U.S. at 226.

Joseph E. Seagram and Sons, Inc.,[10] This Court held that maximum price fixing agreements were per se illegal. In *Arizona v. Maricopa County Medical Society*,[11] this Court held that "the anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

While Respondents may argue that the price fixing here is a novel form of price restraint, it is price fixing nonetheless as shown by their own characterization of the restraints as "fee regulation." Respondents went beyond the mere announcement of what they had considered "reasonable charges" and sought, through coercive measures, to impose price limits and change the practices of target doctors. In taking affirmative action to achieve uniform adherence to its "fee regulations," Respondents took away Petitioners' free choice as to what Kasnetz' charges should be considering his skill and level of expertise in his area of practice, and thus impermissibly interfered with Petitioners' medical practice.[12] The separate Respondents conspired among themselves to fix the prices which they determined all physicians in Texas should charge.

This case does not present the traditional price fixing arrangements usually seen by the courts, but Petitioners proved the elements of both vertical and horizontal per se price fixing. Physicians play an important role at the Respondent companies in the establishment of the "usual, customary, and reasonable" levels for physician charges. Substantial physician control in Blue Cross/Blue Shield situations is fairly common. This physician control estab-

---

[10] 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951).

[11] 457 U.S. 332, 351, 102 S. Ct. 2466, 2476, 73 L. Ed. 2d 48 (1982).

[12] *United States v. Parke, Davis and Co.*, 362 U.S. 29, 46-47, 80 S. Ct. 503, 513, (1960).

lishes a vertical link and competitive relationship between Respondents and Petitioners for anti-trust purposes.

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*,[13] the Court examined the role of physicians in the operation of Blue Cross/Blue Shield's plans. Two insurance plans, Blue Shield of Virginia and Blue Shield of Southwestern Virginia, refused to pay for charges by clinical psychologists unless billed through a physician. One of the methods used to control the billing practices of the clinical psychologists was to refuse direct payment for services not billed through a physician,[14] essentially the same practice employed here. The appellate court reversed the lower court's ruling which had ignored the role of physicians in the plans and held that physician control brought the Blue Shield actions within the purview of Section 1 of the Sherman Act.[15] Here, Respondents' physicians in management made the decisions to fix the prices that physicians should charge and then went about enforcing those price restrictions. The degree of physician control of the Respondents is a proper fact question for the jury.

This Court has held that the setting of maximum fees chargeable by physicians is per se horizontal price fixing.[16] There, as here, the price restraint tended to provide the same economic rewards to all medical practitioners regardless of their skill, experience, training or innovation. The court stated that such restraints could discourage entry into the market and deter experimentation and new developments by individual entrepreneurs.[17] Here, Respondents'

---

[13]624 F. 2d 476 (4th Cir. 1980).
[14]*Id.* at 478.
[15]*Id.* at 481.
[16]*Arizona v. Maricopa County Medical Society, supra.*
[17]*Id.* at 2475.

price restraints attempt to equalize economic rewards for all physicians regardless of skill or experience and have the collateral effect of discouraging entry into specialty fields and experimentation.

4. *Whether the District Court erred in holding that the evidence, when viewed most favorably to Petitioners, did not warrant submission to the jury of the boycott issues.*

Respondents boycotted Petitioners by their program expressly intended to force the doctors, including Kasnetz, to charge only those fees and render only those services which Respondents had determined were reasonable according to their own established standards. Once these efforts failed, Respondents successfully dissuaded and prevented their insureds from using Petitioners to supply medical services, a classic group boycott.

In *Virginia Academy of Clinical Psychologists*,[18] the Court held that it was a restraint of trade for two Blue Shield plans to refuse payment for services rendered by clinical psychologists since this policy forced two independent economic entities to act as one with the effect of diminishing competition in the health care field.[19] This Court should not reject Petitioners' claims of group boycott and price fixing on the ground that Petitioners and Respondents are somehow not direct competitors. A close review of the decision in *Virginia Academy of Clinical Psychologists* reveals that the District Court here should have looked beyond the obvious relationship between Petitioners and Respondents and evaluated the impact of the challenged practice upon competi-

---

[18] *Supra*.

[19] *Id.* at 484-485.

tive conditions.[20] Respondents' decisions as to who will be paid for medical services necessarily dictate which practitioners will be chosen from among those competent under the law to provide such services.

---

[20]"The rule of reason looks to the impact of the challenged practice upon competitive conditions....The district court's finding that 'the clinical psychologist is not competitive with the psychiatrist in treating nervous and mental disorders...' reflects a value judgment rather than an evaluation of anticompetitive effects....The Blue Shield plans are dominant sources of health care coverage in Virginia. Their decisions as to who will be paid for psychotherapy necessarily dictate, to some extent, which practitioners will be chosen from among those competent under the law to provide such services." *Id.* at 485.

CONCLUSION

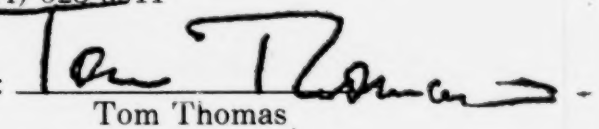
For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

DATED this 28th day of January, 1986.

Respectfully submitted,

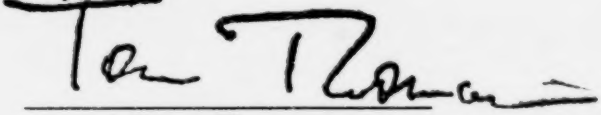
KOLODEY & THOMAS
Eleventh Floor
Two Turtle Creek Village
Dallas, Texas 75219

(214) 528-5511

By: 
Tom Thomas
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded in the United States mail, postage prepaid, to Mr. Curtis Frisbie, Gardere & Wynne, 1500 Diamond Shamrock Tower, Dallas, Texas 75201 on this 28th day of January, 1986.


Tom Thomas

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

Irving Ear, Nose, Throat & Allergy Clinic and Herbert R. KASNETZ, M.D., Plaintiffs-Appellants

v.

Group Hospital Service, Inc., Group Life and Health Insurance Company, and Group Medical and Surgical Service Company, d/b/a Blue Cross and Blue Shield of Texas, Defendants-Appellees

No. 84-1404.

United States Court of Appeals,
Fifth Circuit.
October 31, 1985.

Before RANDALL, HILL AND DAVIS, CIRCUIT JUDGES.

Davis, Circuit Judge:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellants, Herbert R. Kasnetz, M.D., an ear, nose, throat and allergy specialist, and his clinic, Irving Ear, Nose, Throat & Allergy Clinic, brought this action against three Texas corporations doing business as Blue Cross/Blue Shield of Texas, alleging violations of Section 1 of the Sherman Act, 15 U.S.C § 1. The district court directed a verdict in favor of the defendants. For the reasons set forth below, we affirm.

I.

The pertinent facts are undisputed. The three defendants to this action, Group Hospital Service, Inc. (GHS), Group Life & Health Insurance Company (GL&H), and Group Medical & Surgical Service (GM & SS), are licensed to operate under the service mark Blue Cross/Blue Shield of Texas. GHS was chartered in 1939 under Article 20 of the Texas Insurance Code as a non-profit hospital service company. GHS writes individual and group hospital plans. GL&H is a wholly-owned subsidiary of GHS, which was acquired by GHS in 1976. Since 1976, GL&H has underwritten group medical and surgical policies to complement the hospitalization policies written by GHS. GHS formed the third defendant, GM & SS, as a statewide mutual assessment, non-profit corporation under Article 14 of the Texas Insurance Code. This entity is owned by its policy holders. Before 1976, when GHS acquired GL&H, GM & SS marketed individual medical and surgical policies; after GHS acquired GL&H, GM&SS stopped writing new business and limited its activity to servicing existing contracts.

The officers of the three defendants operating under the Blue Cross/Blue Shield umbrella are identical. All sales and claims employees are carried on the payroll of GHS and they perform functions, as required, for all three companies. The twenty directors of GHS also serve on the boards of GL&H and GM & SS. The latter two entities have three additional directors. Common board meetings are held for all three entities.

Blue Cross/Blue Shield of Texas instituted a cost containment program in 1976 in which it undertook to reimburse

physicians fees on the basis of what it considered usual, customary, and reasonable (UCR) fees. Defendants established UCR fees for a number of individual medical procedures by reviewing actual fees charged by a large number of physicians practicing in a geographic area. It also evaluated physicians' patterns of practice to assess how often specific procedures were performed for a given number of patients. With this information, the insurer identified physicians who sought to charge fees it considered excessive or who performed medical services of questionable necessity. The insurer suggested that those physicians so identified reduce their charges and services to the acceptable range. If the physician did not agree to do so, the insurer declined to pay the physician and exercised the right granted to it in its policy to directly reimburse patients for services provided by these physicians based on the UCR charge.[1] In addition, claims for those physicians' services were subjected to closer prepayment scrutiny than that customarily given.

Kasnetz operated his ear, nose, throat and allergy clinic in Irving, Texas. Approximately one-third of his patients were insured by Blue Cross/Blue Shield. Until 1976, Kasnetz billed Blue Cross/Blue Shield directly for payment of patient services and the insurer routinely reimbursed the physician. In 1976, however, the insurer identified Kasnetz as a physician who performed medically unnecessary procedures and who assessed multiple charges for essentially the same services. The insurer informed Kasnetz that payment for covered services for its policy holder would be made to the policy holders and not to Kasnetz, and then only after prepayment review.

Kasnetz brought this action complaining that the insurer's cost containment program, which led to a reduction in his income and the size of his practice, violated Section 1 of the Sherman Act. He alleged: (1) horizontal and vertical price fixing; (2) horizontal group boycott; and (3)

---

[1]Blue Cross/Blue Shield's standard policy provided for payment of a specified percentage of the reasonable charges for medically necessary services.

restraint of trade. At the close of the plaintiff's case after five days of jury trial, the district court directed a verdict in favor of the defendant insurer. The district court concluded that the evidence was insufficient to establish a conspiracy because the three defendants were a single economic entity incapable of conspiracy; alternatively, the district court assumed the defendants had the capacity to conspire and nevertheless found evidence of a Sherman Act violation insufficient to raise a jury issue.

II.

A.

We review this appeal from a directed verdict under the familiar *Boeing* standard and consider:

> [A]ll of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

To prevail under Section 1 of the Sherman Act, plaintiff must show a contract, combination or conspiracy, in restraint of trade or commerce. 15 U.S.C. § 1.

The district court based its decision that the defendant corporations lacked the capacity to conspire on the notion that the three defendants acted as a single entity. The defendants contend that *Copperweld Corp. v. Independence Tube Corp.,* U.S. , 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), supports the district court's ruling and is controlling. In *Copperweld,* the Court held that a parent corporation and its wholly-owned subsidiary have a "unity of purpose or a common design" and are incapable of conspir-

ing with each other. *See also Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984). Under the teaching of *Copperweld*, the district court was clearly correct in concluding that GHS and its wholly-owned subsidiary, GL&H, are incapable of conspiring with each other. Because the alternate ground for the district court's ruling is solidly grounded in established law, we find it unnecessary to decide whether *Copperweld* should be extended to hold that GM & SS is incapable of conspiring with the other two defendants.

B.

In his complaint and in his brief on appeal, Kasnetz alleged per se violations of Section 1 by defendants in agreeing to fix prices and to conduct a horizontal boycott.[2] In addition, he alleged a conspiracy in restraint of trade, a Section 1 claim to be tested under the rule of reason. At oral argument, Kasnetz conceded that he had failed to establish a per se violation of Section 1 but argued that under the rule of reason, he had presented sufficient evidence to have his case submitted to the jury. We agree with the conclusion of the district court that insufficient evidence was adduced to present a jury issue on plaintiff's restraint of trade claim under a rule of reason analysis as well as his claim of a per se violation.[3]

---

[2]Actions identified by courts as per se violations include price fixing agreements and horizontal group boycotts and are presumed to have a pernicious effect on competition. Once per se illegal activity is shown, no evidence need be presented of anti-competitive effects. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

[3]The district court's decision to direct a verdict on the alleged per se violations is clearly correct on the undisputed facts presented in this case. The three defendants did not compete with each other, or hold themselves out as competitors. Also, Kasnetz provided medical services and did not sell health insurance so Kasnetz did not compete with the three defendants. Thus, no evidence of horizontal price fixing or illegal boycott by defendants was adduced. *See Plueckhahn v. Farmers Ins. Exchange*, 749 F.2d 241, 245 (5th Cir. 1985); *Blackburn v. Crum & Forster*, 611 F.2d 102, 104 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980). Likewise, because Kasnetz sold no products, goods or services supplied him by the defendants, no evidence of a vertical link necessary to establish vertical price fixing (as in resale price maintenance) was presented. *See Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985).

To survive a motion for directed verdict on the restraint of trade claims, analyzed under a rule of reason, Kasnetz was required to adduce evidence tending to show that the alleged agreement had an effect on competition among physicians in his geographic area; he was required to present evidence of "antitrust injury, . . . injury of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful; the injury must reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1777).

Kasnetz presented evidence in support of his contentions that the insurer's cost containment program injured his practice and reduced his income but he did not demonstrate injury to competition in the market area. He showed that the insurer's effort to reduce medical costs had the effect of reducing the number of patients who came to him for care; those who had difficulty with reimbursement stopped using his services and no longer referred friends to him. Kasnetz did not show, however, that Blue Cross/Blue Shield's program affected competition among physicians of his specialty or among any physicians in his geographic area. Thus, Kasnetz utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade.

AFFIRMED.

APPENDIX B

15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal: penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.